



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 627

[FHWA Docket No. FHWA-2013-0039]

RIN 2125-AF64

Value Engineering

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of Proposed Rule Making (NPRM); request for comments

SUMMARY: The FHWA proposes to update the existing value engineering (VE) regulations to make the regulations consistent with the statutory changes in the Moving Ahead for Progress in the 21st Century Act (MAP-21) and to make other non-substantive changes for clarity.

DATES: Comments must be received on or before [insert date, 60 days after date of publication in the Federal Register]. Late comments will be considered to the extent practicable.

ADDRESSES: You may submit comments, identified by docket number FHWA-2013-0039, by any of the following methods:

Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey

Avenue, SE., Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number FHWA-2013-0039 on your comments. All comments received will be posted, without change, to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Ken Leuderalbert, Value Engineering and Utilities Program Manager, FHWA Office of Program Administration, Federal Highway Administration, 575 North Pennsylvania Street, Indianapolis, IN 46204, (317) 226-5351, or via e-mail at ken.leuderalbert@dot.gov, or Mr. Michael Harkins, FHWA Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366-4928, or via e-mail at michael.harkins@dot.gov. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov> or the Government Printing Office's Web page at: <http://www.gpo.gov/fdsys/>.

Background

The FHWA proposes to update the existing regulations governing the conduct of VE analyses in the planning and development of highway improvement projects to ensure consistency and compatibility with recent changes to the underlying statutory authority at section 106(e) of title 23, United States Code (U.S.C.). On July 6, 2012, MAP-21 (Pub. L. 112-141) was signed into law. Section 1503(a)(3) of MAP-21 amended 23 U.S.C. 106(e) by increasing the project monetary thresholds triggering the need for a VE analysis, specifying that a VE analysis is not required for projects delivered using the design-build method of construction, and defining the requirements for a State Transportation Agency (STA) to establish and sustain a VE Program under which VE analyses are conducted on all applicable projects.

In late 1995, Congress passed the National Highway System Designation Act which directed the Secretary to establish a program that required States to carry out a VE analysis for all Federal-aid highway projects on the National Highway System (NHS) with an estimated total cost of \$25 million or more. On February 14, 1997, FHWA established its VE regulations in 23 CFR part 627, formally establishing the FHWA VE program along with the requirement that STAs create and sustain a VE program. Section 1904 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy

for Users (Pub. L. 109-59), required that a VE analysis be conducted for bridge projects with an estimated total cost of \$20 million or more and any other projects determined by the Secretary of Transportation to be appropriate.

Section 1503(a)(3) of MAP-21 modified the requirements and raised the thresholds for when a VE analysis is required to \$50,000,000 or more for projects on the NHS using Federal-aid Highway Program Funding (FAHP) assistance, and \$40,000,000 or more for bridge projects on the NHS receiving Federal assistance. Section 1503(a)(5) removed the requirement to conduct a VE analysis for projects delivered using the design-build method of construction. In addition, MAP-21 defined the requirements for an STA to establish and sustain a VE Program under which VE analyses are conducted on all applicable projects, consistent with the current regulations pertaining to STA VE programs (as specified in 23 CFR 627.9).

In Fiscal Year 2011, STAs performed VE analyses on 378 Federal-aid highway projects and approved and implemented a total of 1,224 VE recommendations, resulting in a construction cost savings of \$1.006 billion. In addition, a savings of \$38.33 million was realized as the result of approved construction VE change proposals (VECP) that were submitted by contractors and accepted by STAs.

The STA VE programs, the VE analyses conducted on applicable projects, and VECPs have resulted in annual cost savings of \$1.7 billion on average from 2002 through 2011. Additional information on STA, local authority, and FHWA VE programs and practices is available at: <http://www.fhwa.dot.gov/ve>. In light of these savings, the

FHWA notes that Congress has provided the Secretary with authority to require STAs to conduct VE analyses on other projects where the Secretary determines that it is appropriate to do so. As such, the FHWA may exercise this discretion on a project-by-project basis for projects that do not fall within the statutory thresholds where the FHWA determines that there is a clear potential for significant savings that outweighs the administrative burden associated with conducting the VE analysis.

Section by Section Discussion of the Proposed Changes to 23 CFR 627

The FHWA proposes to revise 23 CFR part 627 – Value Engineering as follows:

Section 627.1 – Purpose and Applicability.

Paragraph (b) would be amended to clarify that the policies and procedures of a State DOT's VE program shall include the requirement to implement approved VE analysis recommendations when a VE analysis is conducted.

Section 627.3 - Definitions.

The definition of final design would be amended to read as follows: “*Final design*. Any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.” The definition of total project costs would be revised to clarify that the total estimated cost of a project includes all of the work that is conducted. The definition of VE Job Plan would be revised to state that the VE Job Plan “may” be scaled to meet the needs of the project rather than that it “should” be scaled.

Section 627.5 – Applicable projects.

Paragraph (b)(1) would be amended to specify that a VE analysis is required for each project on the NHS with an estimated total project cost of \$50 million or more that utilizes Federal-aid highway funding instead of the previous threshold of \$25 million.

Paragraph (b)(2) would be amended to specify that a VE analysis is required for each bridge project on the NHS with an estimated total project cost of \$40 million or more that utilizes Federal-aid highway funding instead of the previous threshold of \$20 million. Paragraph (b)(2) would also be amended to remove the VE analysis requirement for bridges off the NHS.

Paragraph (e) would be amended to clarify that a VE analysis is no longer required for projects delivered using the design-build method of construction. However, STAs and local public agencies are still encouraged to conduct VE analyses for such projects.

Paragraph (f) would be amended to clarify that a VE analysis is required for projects delivered using the Construction Manager/General Contractor (CM/GC) method of contracting that meet the monetary thresholds defined in 23 CFR 627.5(b).

Section 627.9 - Conducting a VE analysis

Paragraph (c) would be amended to clarify that when a STA or local authority chooses to conduct a VE analysis on a design-build project, the VE analysis must be performed prior to the release of the Request for Proposal (RFP).

Paragraph (d) would be amended to add a section clarifying that a VE analysis is not required to be completed prior to the release of the RFP for CM/GC contracts.

However, the VE analysis would need to be completed, and approved recommendations would need to be incorporated into the project plans, prior to requesting a construction price proposal from the CM/GC contractor.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the DOT will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has determined that this proposed rule is not a significant regulatory action within the meaning of Executive Order 12866 and is not a significant rulemaking within the meaning of the DOT regulatory policies and procedures.

The changes that this rule proposes are requirements mandated by MAP-21 and are intended to clarify and revise the requirements for conducting a VE analysis. Additionally, this action complies with the principles of Executive Order 13563. After

evaluating the costs and benefits of these proposed amendments, the FHWA anticipates that the economic impact of this rulemaking will be minimal. These changes are not anticipated to adversely affect any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the FHWA has evaluated the effects of this rule on small entities, such as local governments and businesses. Based on this evaluation, the FHWA anticipated this action would not have a significant economic impact on a substantial number of small entities. The proposed amendment clarifies and revises the requirements for conducting a VE analysis on applicable projects using Federal-aid highway funding. After evaluating the cost of these proposed amendments, as required by changes in authorizing legislation, the FHWA believes the impacts upon small entities that use FAHP funding on projects would be negligible. Therefore, I certify that the proposed action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This NPRM would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). The actions proposed in this NPRM would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$143.1 million or more

in any one year (2 U.S.C. 1532). Furthermore, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and Tribal governments and the private sector. Additionally, the definition of "Federal Mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and the FHWA has determined that this proposed action does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this proposed rule directly preempts any State law or regulation or affects the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

The FHWA invites public comment about our intention to request the Office of Management and Budget approval for a new information collection, which is summarized in the Background section of this document. We are required to publish this notice in the Federal Register by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.).

Collection Title: Value Engineering Analyses on Federal-aid Highway Projects.

Type of Request: New information collection requirement.

Respondents: 50 States, the District of Columbia, and Puerto Rico.

Frequency: One collection every year.

Estimated Average Burden per Response: Nationwide on average there are approximately 400 VE analyses that are conducted annually. It will take approximately 30 minutes to compile the results of each VE analysis that is conducted. It will also take approximately 3 hours to compile the results of all of the VE analyses that are conducted annually in each State DOT, the District of Columbia, and Puerto Rico and to submit these results to FHWA.

Estimated Total Annual Burden Hours: Approximately 356 hours per year.

When submitting comments for this proposed information collection, use the FHWA Docket ID Number FHWA– 2013–0039. You may use by any of the following methods:

Web Site: For access to the document to read background documents or comments received go to the Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Document Management Facility, U.S. Department of Transportation,
West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE.,
Washington, DC 20590.

Hand Delivery or Courier: U.S. Department of Transportation, West Building
Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

National Environmental Policy Act

The FHWA has analyzed this rule for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 et seq.) and has determined it will not have any effect on the quality of the human and natural environment, because this rule merely establishes the requirements to conduct a VE analyses whenever an applicable Federal-aid highway project is to be design and constructed. Therefore, this action is categorically excluded in 23 CFR 771.117(c)(20).

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that this rule would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal law. This proposed rulemaking revises the existing requirements to conduct a VE analyses whenever an applicable Federal-aid highway project is to be designed and constructed. As such, this proposed rule would not impose any direct compliance requirements on Indian Tribal

governments nor would it have any economic or other impacts on the viability of Indian Tribes. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use. We have determined that this proposed action would not be a significant energy action under that order because any action contemplated would not be likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, the FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12898 (Environmental Justice)

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this rule does not raise any environmental justice issues.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule and has determined that this proposed action would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, and certifies that this proposed action would not cause an environmental risk to health or safety that may disproportionately affect children.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 627

Grant programs-transportation, Highways and roads.

Issued on: August 12, 2013

Victor M. Mendez

FHWA Administrator

In consideration of the foregoing, the FHWA proposes to amend title 23, Code of Federal Regulations, part 627 as follows:

1. **TITLE 23 PART 627 – VALUE ENGINEERING** The authority citation for part 627 continues to read as follows:

Authority: 23 U.S.C. 106(e), 106(g), 106(h), 112(a) and (b), 302, 315; and 49 CFR part 18.

§ 627.1 [Amended]

2. In § 627.1, amend paragraph (b) by removing the words “identifying when a VE analysis is required” and adding in its place the words “under which VE analyses are identified, conducted and approved VE recommendations implemented on applicable projects (as defined in 627.5 of this part)”.

3. Amend § 627.3 by:

- a. Revising the definitions “Final Design” and “Total Project Costs,” and
- b. Amending the definition of “Value Engineering VE Job Plan” by removing the word “should” and adding in its place the word “may”.

The revisions read as follows:

§ 627.3 Definitions.

* * * * *

Final Design. Any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.

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Total Project Costs. The estimated costs of all work to be conducted on a project including the environment, design, right-of-way, utilities and construction phases.

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4. Amend § 627.5 by:

a. Amend paragraph (a) by adding the words “prior to authorizing the project for construction (as specified in 23 CFR 630.205)” at the end of the sentence.

b. Revise paragraphs (b) introductory text, (b)(1), (2) and (3),

c. Amend paragraph (b)(4) by removing the words “for which” and adding in its place “where”, and by adding the word “construction” between the words “the letting”.

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d. Amend paragraph (b)(5) by removing the words “Federal-aid” and “the” and adding the words “that utilizes Federal-aid highway program funding” to the end of the sentence.

e. Revise paragraph (c).

f. Amend paragraph (d) by removing the words “any additional VE analysis” and adding in its place “additional VE analyses” and by adding the words “where there is a high potential for the project to benefit from a VE analysis” at the end of the sentence.

g. Revise paragraph (e) to read.

h. Add paragraph (f).

The revisions and additions read as follows:

§ 627.5 Applicable projects.

* * * * *

(b) Applicable projects requiring a VE analysis shall include the following:

(1) Each project located on the National Highway System (NHS) (as specified in 23 U.S.C. 103) with an estimated total project cost of \$50 million or more that utilizes Federal-aid highway funding;

(2) Each bridge project located on the NHS with an estimated total project cost of \$40 million or more that utilizes Federal-aid highway funding;

(3) Any major project (as defined in 23 U.S.C. 106(h)), located on or off of the NHS, that utilizes Federal-aid highway funding in any contract or phase comprising the major project;

* * * * *

(c) An additional VE analysis is not required if, after conducting a VE analysis required under this part, the project is subsequently split into smaller projects in the design phase or the project is programmed to be completed by the letting of multiple construction projects. However, the STA may not avoid the requirement to conduct a VE analysis on an applicable project by splitting the project into smaller projects, or multiple design or construction projects.

* * * * *

(e) A VE analysis is not required for projects delivered using the design build method of construction. While not required, FHWA encourages STAs and local public authorities to conduct a VE analysis on design build projects that meet the requirements identified in subsection (b) of this section.

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(f) A VE analysis is required on projects delivered using the Construction Manager/General Contractor (CM/GC) method of contracting, if the project meets the requirements identified in subsection (b) of this section.

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§ 627.7 [Amended]

5. Amend § 627.7 by:

a. Amending paragraph (a) by removing the phrase “conducted for all applicable projects” and inserting the phrase “identified, conducted and approved VE recommendations implemented on all applicable projects (as defined in 627.5 of this part)”.

b. Amending paragraph (b) by adding the words “prior to the project being authorized for construction (as specified in 23 CFR 630.205).” to the end of the sentence.

6. Amend § 627.9 by:

a. Revising paragraph (c).

b. Redesignating paragraphs (d), (e), (f), (g) and (h) as paragraphs (e), (f), (g), (h) and (i) respectively.

c. Adding a new paragraph (d) to read as follows:

The revisions and additions read as follows:

§ 627.9 Conducting a VE analysis.

* * * * *

(c) When a STA or local public agency chooses to conduct a VE analysis for a project utilizing the design-build project delivery method the VE analysis must be performed prior to the release of the final Request for Proposals or other applicable solicitation documents.

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(d) For projects delivered using the CM/GC contracting method, a VE analysis is not required prior to the preparation and release of the RFP for the CM/GC contract.

The VE analysis is required to be completed and approved recommendations incorporated into the project plans prior to requesting a construction price proposal from the CM/GC contractor.

[FR Doc. 2013-20315 Filed 08/28/2013 at 8:45 am; Publication Date: 08/29/2013]